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No. 65857-3-I

COURT OF APPEALS, DIVISION I
STATE OF WASHINGTON

EMERALD GARDENS CONDOMINIUM OWNERS
ASSOCIATION,

Plaintiff-Appellant

v.

U.S. BANK, N.A. AS TRUSTEE FOR THE REGISTERED
HOLDERS OF MASTR BACKED SECURITIES TRUST,
2006-AM1, MORTGAGE PASS-THROUGH CERTIFICATES,
SERIES 2006-AM1,

Defendant-Respondent

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COURT OF APPEALS
DIVISION I
SEATTLE, WASHINGTON

BRIEF OF RESPONDENT

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I. INTRODUCTION

This is an appeal of the trial court's decision to vacate Appellant Emerald Gardens Condominium Owners Association's ("Association") Order of Default and Judgment Quieting Title to Property (collectively "Default Judgment"). Respondent U.S. Bank, N.A. as Trustee for the registered holders of MASTR Asset Backed Securities Trust, 2006-AM1, Mortgage Pass Through Certificates, Series 2006-AM1 ("U.S. Bank") designated outside counsel, Kelly Sutherland, to represent U.S. Bank against the Association's wrongful lien foreclosure action.

Mr. Sutherland appeared on behalf of U.S. Bank in February 2010 by contacting the Association's attorney, Patrick McDonald, and confirmed his representation in writing. Despite having notice that Mr. Sutherland represented U.S. Bank in the matter involving the Association, Mr. McDonald commenced a quiet title action in June 2010 and obtained a Default Judgment without providing any notice to Mr. Sutherland.

In exercising its discretion and equitable powers, the trial court properly held (1) U.S. Bank was entitled to notice of the Association's motion for default and the Association's failure to provide notice rendered the Default Judgment void; (2) the Default Judgment should be set aside

under CR 55(c) and CR 60(b); and (3) good cause was shown and justice required the Default Judgment be set aside and vacated.

II. QUESTIONS PRESENTED

1. Whether the trial court properly concluded U.S. Bank was entitled to notice of the Association's motion for default when the Association's attorneys knew that Mr. Sutherland was representing U.S. Bank in the matter involving the Association's wrongful lien foreclosure action.
2. Whether the trial court properly exercised its discretion in concluding the Association's Default Judgment should be vacated under CR 55(c) and CR 60 for mistake, inadvertence, surprise and/or excusable neglect when U.S. Bank did not answer the quiet title complaint because it had designated Mr. Sutherland to handle the matter as outside counsel and he had already contacted the Association's attorneys to appear on behalf of U.S. Bank in its dispute with the Association.

III. COUNTER-STATEMENT OF THE CASE

A. U.S. Bank's First Position Deed of Trust. On or about September 9, 2005, Elizabeth Swanson ("Swanson") obtained a loan in the amount of \$151,325.00, evidenced by a promissory note, from Aames Home Loan to purchase the property commonly known as 10025 9th Avenue West G201, Everett, WA 98204 (the "Property"). CP 426. To secure performance of the promissory note, Swanson

granted Aames Home Loan a Deed of Trust, which was recorded as a first position mortgage lien against the Property on October 3, 2005 under Snohomish County Auditor's File Number 200510031182 ("Deed of Trust"). CP 426.

The Deed of Trust was assigned several times and was eventually assigned to U.S. Bank. CP 426. **On April 3, 2007**, a Notice of Trustee's Sale was recorded under Snohomish County Auditor's File Number 200704030811, which identified U.S. Bank as the current beneficiary of the Deed of Trust. CP 426. The Notice of Trustee's Sale explicitly provides in relevant part:

“...subject to that certain Deed of Trust dated 9/9/2005, recorded 10/3/2005, under Auditor's File No. 200510031182...to secure an obligation in favor of AAMES FUNDING CORPORATION DBA AAMES HOME LOAN, as Beneficiary...**the beneficial interest in which was assigned** by AAMES FUNDING CORPORATION DBA AAMES HOME LOAN **to U.S. BANK...**”

CP 26, CP 371.

The nonjudicial foreclosure proceedings were stopped and recommenced several times due to work out agreements between Swanson and the lender as well as Swanson's bankruptcy filing and termination of the automatic stay. CP 427.

Eventually, U.S. Bank once again recommenced nonjudicial foreclosure proceedings in November 2009 and a Notice of Trustee's Sale was recorded on November 12, 2009 under Snohomish County Auditor's File Number 200911120629. CP 427. U.S. Bank purchased the Property at the Trustee's Sale and the Trustee's Deed was recorded on February 16, 2010 under Snohomish County Auditor's File Number 201002160465. CP 427.

B. The Association's Lien Foreclosure Action. The Association filed an action to collect delinquent condominium assessments on **May 15, 2007** (more than one month after the Notice of Trustee's Sale was recorded identifying U.S. Bank as the beneficiary under the Deed of Trust). CP 427. The Association asserted a lien against the Property and sought foreclosure of its lien for the unpaid condominium assessments. CP 427-8.

Despite the Notice of Trustee's Sale recorded on April 3, 2007 identifying U.S. Bank as the beneficiary of the Deed of Trust, Plaintiff did not name U.S. Bank as a defendant in its lien foreclosure action. Plaintiff incorrectly named Aames Home Loan as a defendant even though Aames Home Loan had assigned the Deed of Trust and was no longer the beneficiary under the Deed of Trust. CP 428.

Aames Home Loan failed to appear or otherwise answer or

defend against Plaintiff's Complaint. Plaintiff obtained an Order of Default against Aames Home Loan on July 6, 2007, which Plaintiff incorrectly assumed would be sufficient to forever foreclose U.S. Bank's interest in the Property under the first position Deed of Trust. CP 428. An Order and Decree of Foreclosure was entered on October 12, 2007. CP 428. Pending the outcome of this appeal, U.S. Bank is prepared to file a Motion for an Order Vacating the Order and Decree of Foreclosure. CP 24, 416-24.

C. Attorney Kelly Sutherland Appeared on Behalf of U.S.

Bank. U.S. Bank was never a party to the lien foreclosure action and had no notice of the lien foreclosure action until after it completed its Trustee's Sale in February 2010. CP 336, 428. Upon discovering the Association's lien foreclosure action, U.S. Bank retained attorney Kelly Sutherland to handle the matter involving the Association.

Mr. Sutherland contacted the Association's attorney, Patrick McDonald on or before February 25, 2010, and explained the Association had wrongfully attempted to subordinate and foreclose the first position mortgage Deed of Trust because U.S. Bank was not made a party to the lien foreclosure action. CP 336, 428. Mr. Sutherland informed Mr. McDonald that a motion to set aside the lien foreclosure judgment would be forthcoming. CP 18, 23. Mr. Sutherland

confirmed his representation of U.S. Bank in his February 25, 2010 letter to Mr. McDonald. CP 336, 411, 428.

Mr. Sutherland has enjoyed a longstanding and familiar working relationship with the law offices of Sundberg and Pody. CP 18, 23. The two law offices have worked on numerous cases over the years and have always exercised professional courtesy by communicating directly with each other to resolve their clients' disputes. CP 18, 23.

Following their initial conversation, Mr. McDonald provided Mr. Sutherland with an ER 408 settlement letter. CP 18, 23, 413. Mr. Sutherland asked Mr. McDonald for an accounting of the costs and expenses incurred by the Association. CP 18, 23. Mr. Sutherland did not receive a response to his request for an accounting and has not received one to date. CP 18, 23-4.

While awaiting an accounting from Mr. McDonald, Mr. Sutherland retained local counsel at Beresford Booth to research the issues surrounding the lien foreclosure action, the merits of filing a motion to vacate, and the settlement options. CP 18, 24. Client approval of the motion to set aside the lien foreclosure action default judgment was pending when Mr. Sutherland discovered the Association had obtained a default in a quiet title action without any

notice to his office. CP 18, 24, 416-24.

IV. ARGUMENT

A. Standard of Review.

Washington courts favor resolving cases on their merits over default judgments. *Sacotte Construction, Inc. v. National Fire & Marine Ins. Co.*, 143 Wn.App. 410, 414, 177 P.3d 1147 (2008). Our courts “will liberally set aside default judgments pursuant to CR 55(c) and CR 60 and for equitable reasons in the interests of fairness and justice.” *Id.* at 414-15 (citations omitted).

An order vacating a default judgment is within the trial court’s discretion and will not be disturbed on review absent an abuse of discretion. *Hardesty v. Stenchever*, 82 Wn.App. 253, 263, 917 P.2d 577 (1996). A trial court abuses its discretion when it exercises “its discretion on untenable grounds or for untenable reasons, or [its] discretionary act was manifestly unreasonable.” *Id.* Default judgments are disfavored. *Id.*

A trial court must exercise its authority “liberally, as well as equitably, to the end that substantial rights [are] preserved and justice between the parties [is] fairly and judiciously done.” ... “[W]here the determination of the trial court results in the denial of a trial on the merits an abuse of discretion may be more readily found than in those instances where the default judgment is set aside and a trial on the merits ensues.”

Id. (citations omitted).

Contrary to the Association's position¹, the standard of review for the trial court's determination of whether a party has substantially complied with appearance requirements is also an abuse of discretion. *Sacotte*, 143 Wn.App. at 415.

B. Under Washington Law, Substantial Compliance with Notice Requirements Entitles the Defendant to Notice Prior to Default.

CR 55(a)(3) requires that notice of a motion for default be given to any party who has appeared in the action for any purpose. A default judgment entered against a party who was entitled to notice will be set aside if notice was not given. *Sacotte*, 143 Wn.App. at 415. Failure to provide notice prior to default renders the default order and judgment void. *Colacurcio v. Burger*, 110 Wn.App. 488, 497, 41 P.3d 506 (2002). Courts have a nondiscretionary duty to vacate void judgments. *Leen v. Demopolis*, 62 Wn.App. 473, 478, 815 P.2d 269 (1991).

A party who substantially complies with the appearance requirements is entitled to notice. *Sacotte*, 143 Wn.App. at 415 (emphasis added and citations omitted). In accordance with the liberal policy toward vacating default judgments, Washington courts have construed the concept of appearance broadly in this context. *Old Republic National Title, Ins.*

¹ Appellant's Opening Brief at p. 8.

Co. v. Law Office of Robert E. Brandt, 142 Wn.App. 71, 74-5, 174 P.3d 133 (2008). The courts have required defendants seeking to set aside a default judgment to be prepared to establish that they actually appeared or substantially complied with the appearance requirements and were thus entitled to notice. *Id.* Under Washington law, “[s]ubstantial compliance with the appearance requirements may be satisfied informally.” *Id.*

In two recent decisions, post *Morin v. Burris*, the Washington State Court of Appeals, Division I, held a telephone call can constitute a notice of appearance if (1) the caller is one who could appear for the defendant, (2) the caller recognizes that the case is in court and (3) the caller manifests an intent to defend. *Old Republic*, 142 Wn.App. at 75; *Sacotte*, 143 Wn.App. at 416.

In *Sacotte*, *Sacotte Construction, Inc.* (“*Sacotte*”) sued its subcontractor’s insurance company, National Fire and Marine Insurance Company (“*NFM*”), for failure to defend. *Sacotte*, 143 Wn.App. at 412. Attorney Jarret Sale called *Sacotte*’s counsel, Greg Harper, to enter an appearance on behalf of *NFM*. *Id.* at 414. Based on their prior working relationship, Mr. Harper knew that Mr. Sale represented *NFM* on several of *NFM*’s insurance coverage matters. *Id.* at 417. Mr. Harper denied receiving a call from Mr. Sale informally appearing on behalf of *NFM* and moved for an order of default “...without giving notice to *NFM* or Sale.”

Id. at 414. The trial court denied NFM's motion to vacate the default judgment. *Id.*

The Court of Appeals, Division I, reversed the trial court and held that NFM substantially complied with appearance requirements and was entitled to notice prior to entry of default. *Id.* at 416. The court based its decision in part on the following reasoning:

...because a proceeding to vacate a default judgment is equitable in character, "a default judgment should be set aside if the plaintiff has done something that would render enforcing the judgment inequitable." In June 2006, Harper knew that Sale represented NFM in other, similar matters. ... In *Old Republic National Title Ins. Co. v. Law Office of Robert E. Brandt, PLLC*, the attorney entering default similarly knew that the lawyer entering the informal appearance had previously represented the defendants. ... Under the circumstances of this case, it was inequitable for Harper to obtain default without notice to NFM.

As an attorney, Harper has a "duty as an officer of the court to use, but not abuse the judicial process." This duty includes employing an acceptable level of professional courtesy to fellow attorneys and their clients.

Id. (emphasis added and citations omitted).

As cited in *Sacotte*, the Court of Appeals, Division I, in *Old Republic*, found the trial court abused its discretion in enforcing the default

judgment. *Old Republic*, 142 Wn.App. at 75. The Court of Appeals reversed the trial court and held the defendants substantially complied with appearance requirements and were entitled to vacate the default judgment as a matter of law. *Id.*

In *Old Republic*, the defendant's attorney, James Ihnot, called plaintiff's counsel, and let him know that he would be representing the Andersons. *Id.* at 73. The plaintiff's attorneys knew that Mr. Ihnot represented the Andersons in at least one other action. *Id.* at 75. In holding Mr. Ihnot substantially complied with appearance requirements and that it would be inequitable to enforce the default judgment, the court reasoned:

Considering the facts of this case, we conclude that Ihnot's telephone conversation with Brandt's attorneys constituted an appearance. Brandt's attorneys knew that Ihnot represented the Andersons in at least one other action. Ihnot asserts that during the conversation, he informed Brandt's attorneys that he was representing the Andersons in this action. ... When viewed together, the telephone call and notice of hearing indicate that Ihnot informed Brandt's attorney's that he was representing the Andersons in this action, and that Brandt's attorneys acknowledged that Ihnot was the Andersons' attorney in this action.

Id. (emphasis added).

C. U.S. Bank Substantially Complied with Notice Requirements, Thereby Entitling U.S. Bank to Notice of the Association's Motion for Default.

In *Sacotte* and *Old Republic*, the Court of Appeals, Division I, observed that the plaintiffs' attorneys in both of the cases knew the informally appearing attorney represented the defendants in other matters, but nevertheless failed to provide notice prior to entry of default. *Sacotte*, 143 Wn.App. at 417; *Old Republic*, 142 Wn.App. at 75.

There can be no reasonable debate the Association was notified Mr. Sutherland was representing U.S. Bank in its dispute with the Association over the Property. Mr. Sutherland's phone call to Mr. McDonald, along with the February 25, 2010 follow up letter, constituted substantial compliance with notice requirements under *Sacotte* and *Old Republic*.

Mr. Sutherland is a licensed and active attorney who worked on numerous matters with the Association's counsel over the years. Mr. Sutherland recognized the lien foreclosure action was filed in court and manifested an intent to defend. During the phone call, Mr. Sutherland notified Mr. McDonald that U.S. Bank disputed the Association's claim of superior title due to the wrongful lien foreclosure action and informed him that U.S. Bank would be filing a motion to vacate. Mr. Sutherland followed up with his telephone call to Mr. McDonald by sending a letter

confirming his representation of U.S. Bank in the matter against the Association.

The quiet title action was not an independent action commenced by the Association, but was a natural result and extension of the dispute between U.S. Bank and the Association. U.S. Bank had designated Mr. Sutherland to handle the dispute with the Association and knew he had contacted Mr. McDonald to appear on behalf of U.S. Bank. Mr. McDonald knew Mr. Sutherland was representing U.S. Bank in its dispute with the Association.

This is not a case of mere pre-litigation contacts as in *Morin v. Burris*, 160 Wn.2d 745, 161 P.3d 956 (2007), argued by the Association. The circumstances present here are more akin to the circumstances found under *Sacotte* and *Old Republic*. In *Sacotte* and *Old Republic*, The Court of Appeals held the defendants' attorneys were entitled to notice prior to default because defendants' attorneys substantially complied with notice requirements via a phone call and follow up correspondence. Further, the plaintiffs' attorneys knew the informally appearing attorney represented the defendants in other matters, but nevertheless failed to provide notice prior to entry of default. *Sacotte*, 143 Wn.App. at 417; *Old Republic*, 142, Wn.App. at 75.

Here, U.S. Bank substantially complied with appearance

requirements as a result of Mr. Sutherland phone call and follow up letter to Mr. McDonald. Further, here Mr. McDonald knew Mr. Sutherland represented U.S. Bank in its dispute with the Association regarding the wrongful foreclosure of the Property. Because the Association failed to provide notice to U.S. Bank or to Mr. Sutherland prior to entry of default in the quiet title action, the Default Judgment is void and the court has a nondiscretionary duty to vacate the void Default Judgment.

D. The Default Judgment Must be Vacated under CR 55(c) and CR 60 and the Four Part Test under *White v. Holm*.

1. Legal Standard for Vacating Default Judgment.

Default judgments are disfavored in Washington, and courts will “...liberally set aside default judgments pursuant to CR 55(c) and CR 60 and for equitable reasons in the interests of fairness and justice...” to allow the determination of controversies on their merits. *Sacotte*, 143 Wn.App. at 415. A court may set aside a default judgment under CR 55(c)

For good cause shown and upon such terms as the court deems just, the court may set aside an entry of default and, if a judgment by default has been entered, may likewise set it aside in accordance with rule 60(b).

Under CR 60(b):

On motion and upon such terms as are just, the court may relieve a party or his legal representative from a final judgment, order, or proceeding for the following reasons:

- ...
- (1) Mistakes, inadvertence, surprise, excusable neglect or irregularity in obtaining a judgment or order;
 - (4) Fraud..., misrepresentation, or other misconduct of an adverse party;
 - (5) The judgment is void;
 - (11) Any other reason justifying relief from the operation of the judgment.

In exercising its discretion to vacate a judgment pursuant to CR 60(b), a trial court must consider whether: (1) there is substantial evidence to support, at least prima facie, a defense to the opposing party's claim; (2) the moving party's failure to timely appear in the action, and answer the opponent's claims was occasioned by mistake, inadvertence, surprise or excusable neglect; (3) the moving party acted with due diligence after notice of entry of the default judgment; and (4) vacating the default judgment would result in a substantial hardship to the opposing party. *Hardesty*, 82 Wn.App. at 263 citing *White v. Holm*, 73 Wn.2d 348, 352, 438 P.2d 581 (1968).

The first two are the major elements to be demonstrated by the moving party, and they, coupled with the secondary factors, vary in dispositive significance as the circumstances of the particular case dictate. Thus, where the moving party is able to demonstrate a strong or virtually conclusive defense to the opponent's claims, scant time will be spent inquiring into the reasons which occasioned entry of the default, provided the moving party is timely in his application and the

failure to properly appear in the action in the first instance was not willful.

White v. Holm, 73 Wn.2d 348, 352, 438 P.2d 581 (1968).

2. U.S. Bank Has a Virtually Conclusive Defense to the Association's Claims.

a. The Association's lien foreclosure action did not affect U.S. Bank's interest.

Washington courts recognize the fundamental rule of law that a mortgagee is a proper party and when not joined in the lien foreclosure action, the resulting judgment is void against such mortgagee. *MB Construction Co. v. O'Brien Commerce Center Associates*, 63 Wn.App. 151, 158, 816 P.2d 1274 (1991) ("Failure to properly serve a 'necessary' party renders the lien foreclosure action void as against all parties, whereas failure to serve a 'proper' party merely renders the action void as to the proper party").

U.S. Bank's defense to the Association's quiet title action is based on the superiority of its Trustee's Deed recorded pursuant to the nonjudicial foreclosure proceedings over the Association's Sheriff's Deed recorded pursuant to the Association's lien foreclosure action. The Association's failure to join U.S. Bank renders the lien foreclosure judgment void. The Association's lien foreclosure action had no effect on U.S. Bank's interest in the Property because the Association failed to

make U.S. Bank a party to its lien foreclosure action despite having notice of U.S. Bank's superior interest in the Property under its first position Deed of Trust.

The timeline of relevant events are as follows:

October 3, 2005	Deed of Trust Recorded
April 3, 2007	Notice of Trustee's Sale Recorded, which identifies U.S. Bank has the holder of the Deed of Trust
May 18, 2007	Association's Lis Pendens Recorded
May 23, 2007	Aames Home Loan served with the lien foreclosure action (no longer the holder of the Deed of Trust)
June 15, 2007	Assignment of Deed of Trust Recorded

The Association is incorrect when it claims:

- a. The Notice of Trustee's Sale "...had language suggesting that the Deed of Trust had been transferred to U.S. Bank..." and
- b. "...the Association had no constructive notice of [U.S. Bank's] interest prior to recording its lis pendens." CP 310-1.

The Notice of Trustee's Sale states the Property is:

"...subject to that certain Deed of Trust dated 9/9/2005, recorded 10/3/2005, under Auditor's File No. 200510031182...to secure an obligation in favor of AAMES FUNDING CORPORATION DBA AAMES

HOME LOAN, as Beneficiary...**the beneficial interest in which was assigned**
by AAMES FUNDING CORPORATION
DBA AAMES HOME LOAN **to U.S.**
BANK...”

CP 26, 371.

There was no reasonable basis for the Association to conclude the language in the Notice of Trustee’s Sale did not explicitly state the Deed of Trust has been assigned to U.S. Bank. It is unreasonable for the Association to conclude the recorded Notice of Trustee’s Sale did not give the Association constructive notice of U.S. Bank’s interest in the Property more than one month prior to the lis pendens.

The Association has no reasonable explanation why it chose to disregard the clear language in the recorded Notice of Trustee’s Sale (which would have been disclosed in a litigation guarantee) and proceed with serving Aames Home Loan rather than U.S. Bank.

Based on the Association’s reasoning, a Notice of Trustee’s Sale has no legal significance. This is simply untrue. A Notice of Trustee’s Sale is a legally significant recorded instrument under Washington’s Deed of Trust Act, chapter 61.24 RCW. The recording of a Notice of Trustee’s Sale by a Trustee on behalf of the holder of the beneficial interest under a Deed of Trust triggers significant legal rights to property. Even if there are errors in the Notice of Trustee’s Sale, a party on notice

of the Notice of Trustee's Sale that fails to bring an action to enjoin the sale will be deemed to have waived defenses to foreclosure of the property. *Brown v. Household Realty Corp.*, 146 Wn.App. 157, 189 P.3d 233 (2008), *Koegel v. Prudential Mutual Savings Bank*, 51 Wn.App. 108, 752 P.2d 385 (1988) (noting a trustee under Washington's Deed of Trust Act is held to exceedingly high standards). There is no merit to the Association's claim that a Notice of Trustee's Sale is an unreliable and legally insignificant recorded instrument that failed to put the Association on notice that the beneficial interest under the Deed of Trust had been assigned to U.S. Bank.

- b. The Lis Pendens did not affect U.S. Bank's interest in the Property.

RCW 4.28.320 provides in relevant part

...every person whose conveyance or encumbrance is subsequently executed or subsequently recorded shall be deemed a subsequent purchaser or encumbrancer, and shall be bound by all proceedings taken after the filing of such notice to the same extent as if he or she were a party to the action.

It has been long recognized by Washington courts that a lis pendens cannot bind a party who has a superior and paramount claim in the property if the plaintiff had notice of such claim and does not make him/her a party to the action. *Wright v. Jessup*, 44 Wash. 618, 622, 87 P.

930 (1906) (citing *Payson v. Jacobs*, 38 Wash. 203, 208, 80 P. 429 (1905)). The relevant language of RCW 4.28.320 has not changed since 1905. The Washington Supreme Court explained the effect of a lis pendens:

If the claim under the unrecorded instrument is superior and paramount to the claim of the plaintiff in the foreclosure, and the plaintiff had notice of such unrecorded instrument, the claimant under the unrecorded instrument would not be bound as a party to the action, and therefore will not be bound if not made a party, even though the lis pendens is filed.

Wright, 44 Wash. at 622 (emphasis added).

Here, U.S. Bank's interest in the Property as assignee of the first position Deed of Trust is paramount and superior to the Association's interest in the Property for delinquent assessments. The Association had notice of the unrecorded Assignment of Deed of Trust based on the recorded Notice of Trustee's Sale identifying U.S. Bank as the holder of the Deed of Trust. Accordingly, U.S. Bank is not bound by the Association's lien foreclosure action.

3. U.S. Bank's Failure to Appear Was Not Willful, But Rather Caused by Mistake, Inadvertence, Surprise, and/or Excusable Neglect.

In *Hardesty v. Stenchever*, the Court of Appeals, Division I, stated, "[t]he real issue here is whether the defendants' failure to respond to the

complaint in *Hardesty II* was the result of mistake, inadvertence, surprise or excusable neglect.” 82 Wn.App. 253, 282, 917 P.2d 577 (1996).

In *Hardesty*, the plaintiff, Michele Hardesty, filed a complaint for medical malpractice against Dr. Morton Stenchever and other parties on November 4, 1993 (“*Hardesty I*”). *Id.* at 256. In *Hardesty I*, the Assistant Attorney General Steve Milam appointed attorney William Leedom to represent the defendants. *Id.* at 257. Certain defendants were dismissed on summary judgment in *Hardesty I* and an appeal followed. *Id.* While the appeal in *Hardesty I* was pending, Hardesty filed a second action on December 9, 1994 (“*Hardesty II*”). *Id.* at 257.

Hardesty’s attorney mailed Mr. Leedom a copy of the complaint in *Hardesty II* and asked if he would accept service. *Id.* The defendants and the attorney general’s office were personally served with the complaint in *Hardesty II*. *Id.* Although Mr. Milam of the attorney general’s office appeared on behalf of the defendants, the defendant’s primary attorney, Mr. Leedom, never responded to Hardesty’s attorneys and did not file an answer in *Hardesty II*. *Id.* Hardesty filed a motion for default, which was served on the attorney general’s office, but failed to provide any notice to Mr. Leedom. *Id.* The Defendants discovered by serendipity that a default had been entered. *Id.*

The Court of Appeals, Division I, affirmed the trial court’s order

vacating the default judgment and concluded the defendants' failure to respond to the complaint in *Hardesty II* was not willful, but a result of excusable neglect. *Id.* at 582-3. The court reasoned:

This requires us to decide whether Steve Milam's failure to pass the complaint on to his outside counsel or his assumption that Hardesty had served Leedom constitutes excusable neglect. Under the facts of this case, the defendants' failure to respond to the complaint in *Hardesty II* is excusable because Milam's belief that Hardesty had also served Leedom was not unreasonable. Leedom filed a notice of appearance and represented the defendants in *Hardesty I*, which involved the same parties and issues. ... Hardesty contends she was only required to serve Steve Milam because he entered an appearance on behalf of the defendants in *Hardesty II* and, therefore, was the only attorney of record. Although perhaps technically correct, we reject this argument in light of Hardesty's knowledge that the defendants were Leedom's clients in *Hardesty I* and Leedom's reasonable belief based on the history of *Hardesty I* that he did not need to file another notice of appearance in *Hardesty II* to receive service.

Id. at 583.

The Court of Appeals further reasoned:

In ruling on a motion to vacate a default judgment the court is exercising its equitable powers. "What is just and proper must be determined by the facts of each case, not by a hard and fast rule applicable to all situations regardless of the outcome."

Although Leedom and Milam may have been inattentive in failing to answer the complaint in *Hardesty II* ... under the facts of this case, it would have been inequitable to allow Hardesty to prevail on the motion for default where her attorneys could have easily informed the attorneys whom they knew to be representing the defendants of the motion for default judgment.

Id.

Notably in both *TMT Bear Creek Shopping Center, Inc. v. Petco Animal Supplies, Inc.*, and *Johnson v. Cash Store*, cited in the Association's brief², the plaintiffs in both those cases provided notice to the defendants prior to obtaining an order of default. In *Petco*, the plaintiff called PETCO when no response was received and explained PETCO was in danger of default. *Petco*, 140 Wn.App. 191, 197 note 2, 165 P.3d 1271 (2007). In *Johnson*, the plaintiff mailed the defendant notice of intent to file for default judgment in advance of the hearing. 116 Wn.App. 833, 839, 68 P.3d 1099 (2003). Here, the Association failed to provide any notice to Mr. Sutherland.

Here, where the Association had a long standing working relationship with Mr. Sutherland and knew he was appearing on behalf of U.S. Bank with respect to U.S. Bank's interest in the Property against the Association, it was inequitable for the Association to obtain the Default

Judgment without providing any notice to Mr. Sutherland. There can be no dispute Mr. McDonald knew Mr. Sutherland represented U.S. Bank with respect to its dispute with the Association.

Following Mr. Sutherland's phone call and February 25, 2010 letter, Mr. McDonald exchanged ER 408 settlement communications with Mr. Sutherland's office. It was reasonable under these circumstances for U.S. Bank to believe its interests with respect to the dispute with the Association were being handled by Mr. Sutherland and that a default would not be taken by the Association without notice. Accordingly, U.S. Bank's failure to appear was not willful, but a result of mistake, inadvertence, surprise and/or excusable neglect.

4. U.S. Bank Satisfies the Two Remaining Elements under *White v. Holm*.

Although the first two elements under *White v. Holm* may be dispositive on their own, U.S. Bank further satisfies the remaining elements, which are (3) that the moving party acted with due diligence after notice of entry of the default judgment; and (4) that no substantial hardship will result to the opposing party. U.S. Bank discovered the quiet title action on Thursday June 17, 2010 and promptly filed the motion to vacate the quiet title default judgment two court days later on Monday, June 21, 2010.

² Appellant's Opening Brief at p. 13-4.

Under these circumstances it is unreasonable for the Association to argue substantial hardship will result from vacating the quiet title default judgment. The Association elected to disregard the Notice of Trustee's Sale and to go forward with its lien foreclosure action without making U.S. Bank a party to such action.

As a result, the Association enjoyed a substantial windfall in purchasing the Property at the Sheriff's Sale without having to satisfy the first position Deed of Trust held by U.S. Bank³. Had the Association properly joined U.S. Bank in its lien foreclosure action, it would have been limited to only six months of assessments for common expenses. The actions undertaken by the Association were made at its own peril when it elected to disregard U.S. Bank's interest in the Property. Vacating the Default Judgment will only require the Association to establish its title to the Property is superior to U.S. Bank's title to the Property in light of the wrongful lien foreclosure action.

To the extent there is any hardship, the trial court ordered U.S. Bank to deposit an amount equal to six months of assessments and attorneys' fees incurred by the Association in its lien foreclosure action with the Clerk of the Court if the Court a determination of the quiet title and lien foreclosure action on their merits.

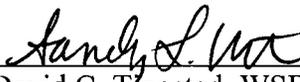
V. CONCLUSION

The trial court properly vacated the Association's Default Judgment. The trial court did not abuse its discretion when it found that

U.S. Bank substantially complied with appearance requirements, thereby entitling U.S. Bank to notice prior to entry of default, when Mr. Sutherland notified Mr. McDonald he represented U.S. Bank in the matters involving the Association. The trial court did not abuse its discretion in finding U.S. Bank satisfied the requirements of CR 55(c), CR 60 and the four part test under *White v. Holm*.

Dated: November 22, 2010

Respectfully Submitted,

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assessed value is \$188,000.00.

CERTIFICATE OF SERVICE

I certify that the foregoing **“Brief of Respondent”** was electronically mailed and sent via legal messenger service on this 24th day of November, 2010, to the following counsel of record:

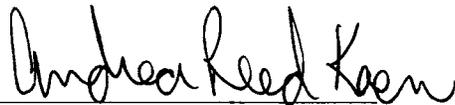
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The **original and one copy** of the **“Brief of Respondent”** was sent to the Court of Appeals, Division I via ABC Legal Services messenger on the above date to:

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